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No. 298.

In the Supreme Court of the United States

OCTOBER TERM, 1926.

U. SHERMAN JOINES, PETITIONER,

VS.

WILLIAM M. PATTERSON, DOROTHY A. McFARLAND, NEE PATTERSON, SHELBY A. PATTERSON, HOWELL M. PATTERSON, J. ALLEN PATTERSON, AND RUBY E. PATTERSON, MINORS, BY THEIR NEXT FRIEND, WILLIAM M. PATTERSON, RESPONDENTS.

STATEMENT OF CASE.

We have no serious objection to the statement of the case as contained in the brief of counsel for petitioner herein, except that we believe that in some instances the statement of the case in behalf of the petitioner is not exactly in line with the agreed state of facts on which the case was tried.

This action was originally instituted in the District Court of Murray County by a petition filed in behalf of W. M. Patterson, surviving husband of Emma Patterson, deceased, and the following children of Emma Patterson, deceased, Dorothy A. McFarland, nee Patterson, Shelby A. Patterson, Howell M. Patterson, J. Allen Pat-

terson, and Ruby E. Patterson. The petition was filed on February 21, 1920, and alleges in substance that the plaintiffs are the sole heirs of the lands of Emma Patterson, deceased, who was a duly enrolled member of the Choctaw Tribe of Indians, enrolled as a Mississippi Choctaw, and alleges the date of the death of Emma Patterson to be at a time when the laws of Arkansas were in force in the Indian Territory (Transcript of Record, pages 4 to 7, inclusive). A general demurrer was filed by U. S. Joines as defendant, and the same was thereafter duly overruled by the trial court (Transcript, page 10). On August 9, 1920, an answer was filed by U. S. Joines, in which the said U. S. Joines deraigned his title to the lands in controversy, setting out that he had acquired title by virtue of a guardianship sale, and attached copies of documents as exhibits to his answer (Transcript, pages 11 to 23, inclusive). A reply was filed by the plaintiffs in the form of a general denial and the case went to trial in the District Court of Murray County, Oklahoma, and the case was tried before the court without a jury on an agreed statement of facts entered into by counsel for the respective parties (Transcript of Record, pages 66 to 70, inclusive). A judgment was rendered by the trial court on May 26, 1921 (Transcript of Record, pages 94-96, inclusive).

The court expressly found that W. M. Patterson acquired a life estate by courtesy in the lands in controversy, but at the same time found that he was barred by the seven year statute of limitations of the laws of Arkansas then in force in the Indian Territory (Transcript, page 94).

From the judgment as rendered the plaintiffs below, W. M. Patterson, *et al.*, prosecuted an appeal to the Supreme Court of Oklahoma, but no cross appeal was prosecuted by the defendant below, U. S. Joines, and the case was submitted to the Supreme Court of Oklahoma on petition in error, with case-made attached, filed by W. M. Patterson, and the other respondents in this court.

As stated by counsel for plaintiff in error, two opinions were rendered by the Supreme Court of Oklahoma, one by Mr. Commissioner Stephenson (Transcript, page 107), and on petition for rehearing having been filed the court granted the rehearing and the last opinion in the case was rendered by Mr. Justice Clark, a member of the supreme court (Transcript, pages 132-142, inclusive).

Propositions number five and six of the plaintiff in error herein were not passed upon or referred to by the Supreme Court of Oklahoma in the opinion to which reference has been made.

In a number of instances counsel for plaintiff in error, in the argument set forth in the brief, refers to matters which he says were agreed upon in the trial below, but we respectfully submit that the agreed statement of facts on which the case was tried and to which reference is herein made definitely sets forth the matters and things which were agreed to and we shall not burden the record with reference to each individual instance wherein we think counsel refers to matters not set forth in the agreed statement of facts.

PROPOSITIONS OF PLAINTIFF IN ERROR.

PROPOSITION No. ONE.

Under the provisions of the Federal Statutes, and of the Laws of Arkansas having the force of Federal Statutes extended in force thereby in Indian Territory, and in force in said territory at the time of the death of Emma Patterson, and necessarily construed by the Supreme Court of Oklahoma in arriving at its opinion herein, William M. Patterson took no estate by courtesy in the lands of his deceased wife, allotted in her name by her administrator after her death, and the opinion of the Supreme Court of Oklahoma holding that he took such estate therein is erroneous.

PROPOSITION No. TWO.

If it be held that under the provisions of the Federal Statutes, and the laws of Arkansas having the force of Federal Statutes in force in Indian Territory at the time of the death of Emma Patterson, her husband, William M. Patterson, did take an estate by courtesy in the lands selected and allotted in her name by her administrator after her death, then his right to assert such estate as against U. Sherman Joines, your petitioner, is barred by the Federal Statutes and laws of Arkansas extended in force in Indian Territory thereby necessarily construed by the Supreme Court of Oklahoma in arriving at its opinion herein, and the opinion of said court holding that such right of action is not barred is erroneous.

PROPOSITION No. THREE.

Under the provisions of the Federal Statutes and the laws of Arkansas as extended in force in Indian Territory, as construed by the highest courts of Arkansas before the extension of said lands to Indian Territory, the United States Court for the Southern District of Indian Territory had jurisdiction to order and confirm the sale by guardian of the lands involved in this action, and under the provisions of the Federal Enabling Act by which Oklahoma was admitted as a state, and the provisions of the Oklahoma Constitution adopted pursuant to said Enabling Act, the jurisdiction to confirm the sale previously ordered and made under the orders of the United States Court for said Southern District was, with the coming of statehood, conferred upon and inherited by the County Court of Carter County, Oklahoma, and the Supreme Court of Oklahoma erred in holding that the sale made under the orders of the said United States Court and confirmed by the order of the County Court of Carter County was void.

PROPOSITION No. FOUR.

The Supreme Court of Oklahoma erred in holding that under the provisions of the Federal statutes in force in Indian Territory prior to statehood, and the laws of Arkansas, extended in force in said territory and having the force of Federal statutes therein, that there was an intervening life estate outstanding in William M. Patterson not terminated by the Arkansas Statute of Limitations, as construed by the highest

court of Arkansas before its adoption, which outstanding life estate would prevent the running of the Oklahoma two-year statute of limitations as against the respondents, Dorothy A. Patterson and Shelby A. Patterson, who attained full age more than two years prior to the filing of this action.

PROPOSITION No. FIVE.

When a statute of one state or nation is adopted by another state or nation, such adoption carries with it, and adopts, the construction given to such statute by the highest court of the state from which it was adopted, if it was construed by such court prior to such adoption.

PROPOSITION No. SIX.

Adult heirs not condition precedent to right of minors to sell.

ARGUMENT AND AUTHORITIES.

We shall discuss the respective contentions advanced by counsel for plaintiff in error in the order in which they are set forth in the brief filed by plaintiff in error, and in connection therewith we shall set forth our authorities and argument in answer to the propositions urged by plaintiff in error.

Plaintiff in Error's Proposition No. 1.

Counsel for plaintiff in error first complains of the opinion of the Supreme Court of Oklahoma in holding that Wm. Patterson succeeded to an estate by curtesy in the lands of his deceased wife. Before proceeding with the argument as to whether or not curtesy would attach where lands are selected after death, we invite the court's attention to the fact, that no exception was taken by counsel for plaintiff in error to the finding of the Trial Court of Murray County sustaining the proposition that William Patterson took an estate by curtesy (page 94, Transcript). No appeal was prosecuted by plaintiff in error from the judgment rendered by the trial court on this question and we insist that plaintiff in error can not be heard to complain of this holding of the supreme court.

In *Maria Eustaquia Ortiz De Rodriguez, by her Husband, Juan Bautista Rodriguez* v. *Jose Antonio Vironi*, reported in 201 U. S., page 371, 50 Law Edition, page 594, this court held that questions not presented by the pleadings nor raised in the lower court will not be considered on appeal.

In the case of *Canal and Claiborne Streets Railroad Company* v. *Hart*, 114 U. S., page 654, 29 Law Edition, page 226, this court in speaking of the failure to raise the objection in the trial court said:

> "This point was not taken in the court below and it does not appear in the motion in arrest of judgment or in the bill of exceptions, or in the **assignment of errors accompanying the writ of error.**"

To the same effect are *Barrow* v. *Reah*, 9 Howard, page 366; *Rogers* v. *Ritter*, 12 Wallace Wall, page 317, 20 Law Edition, page 417.

It is true that the trial court held that the Statute of Limitations had barred any right of action to which William Patterson should have been entitled but we insist that plaintiff in error can not now complain of the holding of the Supreme Court of Oklahoma for the reason that no appeal was prosecuted by him from the judgment of the trial court.

The trial court, as heretofore shown, held that W. M. Patterson acquired a life estate by curtesy in the lands in controversy but at the same time found that he was barred by the seven year Statute of Limitations of the laws of Arkansas then in force in the Indian Territory. There was no cross petition on appeal filed by the defendant in the lower court and for that reason the adjudication of that question was final as against the defendant, plaintiff in error here. The Supreme Court of Oklahoma has held this a number of times and as authority on this proposition we call the court's attention to the case of *Nelson* v. *Reynolds*, 158 Pac., page 391, the syllabus of which reads as follows:

> "Where a defendant in error fails to file a cross petition in error, only those questions presented for assignments in the petition in error are properly reviewable by the supreme court on appeal."

Also the case of *Horn* v. *Bohler*, 178 Pac., page 664, the syllabus of which reads as follows:

> "Where the defendants in error have not filed a cross petition in error, alleged erroneous rulings of the trial court against them will not be considered on appeal."

and our contention is that since this question could not be considered by the Supreme Court of Oklahoma because no cross petition was filed by the defendant in error, then this court has no jurisdiction to consider the same because this court can only consider the questions which the Supreme Court of Oklahoma might have considered.

In the case of *Finley* v. *Halliburton*, 251 Fed. page 860:

> "Where a trust company, which made advances to a lessee to enable her to build on the demised ground, sued the lessee and lessor in the same proceedings recovered for rent due, and foreclosure was ordered, the original decree, not having been appealed from the lessee, is conclusive as to her, notwithstanding the lessor's appeal from the decree in favor of the trust company, and a subsequent agreement between the parties."

To the same effect is the case of *Dotterer* v. *Chicago, R. I. & P. R. Co.*, 78 Okla., page 67, 188 Pac. 1055, the syllabus of which reads as follows:

> "This court will not consider whether on the trial of a cause there was error in a ruling against defendant in error when such ruling is not involved in any error assigned by plaintiff in error, in the absence of a cross petition in error."

The fact that the appellant or plaintiff in error, in the Supreme Court of Oklahoma attacked the ruling of the lower court on the question of limitation as to the life estate of W. M. Patterson does not raise the question of the correctness of the court's ruling on the question of his obtaining a life estate.

Assuming that counsel for plaintiff in error may at this time complain of the holding of the trial court we desire to call attention to those cases and statutes which, in our opinion, sustain the judgment of the trial court as to the right of curtesy. It is insisted that chapter 49 of Mansfield's Digest of the Laws of Arkansas makes no reference to an estate by curtesy and that, therefore, the Supreme Court of Oklahoma is in error in sustaining the right of curtesy.

In answer to this contention we respectfully call attention to the Act of Congress of May 2nd, 1890, 26 Stat., page 94, Section 31 of this act provides:

> "That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that state of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise pro-

vide, that is to say, the provisions of the said general statutes of Arkansas relating to administration."

In the Curtis Act of June 28th, 1898, chapter 517, 30 Stat., page 495 the Laws of Arkansas were extended over and made applicable to conditions in the Indian Territory, and whatever provision was made in the Arkansas Statute with reference to curtesy would apply to conditions in the Indian Territory and we do not think that the contention of counsel in this respect is supported by sound reasoning.

The Supreme Court of Oklahoma in the case of *Johnson* v. *Simpson*, 40 Okla., page 413; 139 Pac., page 129, has construed the two federal statutes, to which reference has been made, and held that curtesy rights would attach in the Indian Territory by reason of the Arkansas laws having been made applicable by the acts of Congress above mentioned. In the first section of the syllabus the law is stated as follows:

> "Curtesy—Existence of Estate. Upon the passage and approval of Act of May 2, 1890, c. 182, 26 St. at L. 94, which extended over and put in force in the Indian Territory the common law of England as adopted by the State of Arkansas, with the proviso excepting Indians and their estates, and Act of June 7, 1897, c. 3, 30 St. at L. 83, which provided that such laws should apply to all persons of the Indian Territory, irrespective of race, and the Curtis Act of June 28, 1898, c. 517, 30 St. at L. 495, which provided that the laws of Indian tribes should no longer be enforced, title by curtesy consummate, as it existed in the State of Arkansas, attached in favor of the husband, to all lands of which the wife became seized during coverture."

If we correctly understand the opinion of this court in the case of *Washington* v. *Miller*, 235 U. S. page 422; 59 L. Ed. page 295, it was held that the Act of May 2, 1890, above referred to "extended over and put in force in the Indian Territory several general laws of the State of Arkansas, among which was chapter 40 of Mansfield's Digest of 1884, relating to descent and distribution."

We quote further from that case the following significant language:

> "But the proviso lost much of its force when the act of June 7, 1897 (30 Stat. at L. 83, chapter 3), declared that 'the laws of the United States and the State of Arkansas in force in the (Indian) Territory shall apply to all persons therein, irrespective of race,' and was practically abrogated when the Act of June 28, 1898 (30 Stat. at L. 495, chap. 517), abolished all tribal courts in the Indian Territory (28) and provided (26) that 'the laws of the various tribes or nations of Indians shall not be enforced at law or in equity by the courts of the United States in the Indian Territory.' Of course, these congressional enactments operated to displace the Creek tribal laws of descent and distribution, and to substitute in their stead the Arkansas law as expressed in chapter 49 Mansfield's Digest."

We submit that these cases sustain the holding of the lower court and that there is no merit in the contention that the laws of Arkansas with reference to curtesy were inapplicable to the Five Civilized Tribes and we leave this phase of the case to discuss the question raised by counsel as to whether or not curtesy rights will attach in a case where the lands were selected for the allottee after death by an administrator

appointed for that purpose. Such are the facts in the case at bar. It is contended by counsel that there was no seisin in the lifetime of the allottee and that therefore curtesy does not attach. In the outset we call the court's attention to the fact that this contention presents a question as to the correctness of the decision of the state court upon a local statute and we insist that the holding of the Supreme Court of Oklahoma is final upon this question. It is our position that the construction by the supreme court of the state of a local statute even though the said statute was made applicable by an act of Congress, is final and not subject to review under the decisions of this court. *Bauserman v. Blunt*, 147 U. S. 648.

The Oklahoma supreme court has held that dower will attach although the lands were selected for the allottee after death. *Cook* v. *Chiles*, 49 Okla. page 321; 152 Pac. page 388. The syllabus of this case reads as follows:

> "The surviving widow of a deceased member of the Choctaw Tribe of Indians who died after his enrollment was finally approved, and before selecting his allotment, where an allotment was afterwards selected in his name by an administrator, and patent issued therefor under the provisions of section 22 of the Act of Congress, July 1, 1902, commonly known as the 'Choctaw, Chickasaw Supplemental Agreement,' is entitled to dower in the lands selected by such administrator."

The principle of law announced in *Cook* v. *Chiles* was reaffirmed and followed in the case of *Morris* v. *Swinney*, 53 Okla. page 163; 155 Pac. page 537, and in this case the court upheld the right of curtesy in lands

selected after death. Our contention is that the case of *Morris* v. *Sweaney* definitely decided the question of law as to curtesy presented in this appeal and that the rule announced in that case is sustained by the great weight of authority.

In *Schultis* v. *McDougal*, 170 Fed., page 529, the circuit court of appeals had under consideration the character of the seisin of the allottee who died before allotment and the court referred in this opinion to section 22 of the Supplemental Treaty ratified September 25, 1902, 30 Stat. page 495, and as we understand the law announced in that case the court held that the land would pass to the heirs in the same manner as if the allottee had died seized thereof.

Reference is made in this opinion to section five of the Act of Congress of April 26, 1906, 34 Stat. page 138, which provides as follows:

> "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective; that the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect."

In referring to this section of the federal statute the court said:

> "Here is an express declaration by Congress that the land shall descend to heirs the same as it

would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own act leaves no room for doubt as to its intent."

In the recent case of *Ned* v. *Countiss*, 84 Okla. page 138; 213 Pac. page 171, the Supreme Court of Oklahoma in discussing the descent of an allotment selected after death of the allottee said:

> "The lands allotted in the name of a duly enrolled Mississippi Choctaw Indian, who died in August, 1903, intestate, and without issue, before receiving her allotment, must be considered as an ancestral estate, within the meaning of section 2531, Mansfield's Digest of the Statutes of Arkansas, extended over and put in force in the Indian Territory by act of Congress."

In *Ground* v. *Dingman*, 33 Okla., page 760; 127 Pac. page 1078, the Supreme Court of Oklahoma said:

> "The descent and distribution of the allotted lands of a citizen of the Creek Nation, who was living on April 1, 1899, and who died after the passage of the Act of March 1, 1901, c. 676, 31 Stat. at L. 861, after which she was enrolled and certificate of allotment issued in her name, and later patent to the lands therein described issued to her heirs, is, by reason of section 28 of said act, governed by the law of descent and distribution of the Creek Nation, to be applied as if the deceased had received title to her allotment during her lifetime and died seized thereof."

In *Barnett* v. *Waw*, 29 Okla., page 780; 119 Pac., page 418, the law is stated in the second section of the syllabus in the following language:

"In determining who are the heirs of a deceased enrolled Creek Indian, who during her lifetime received the allotment of the use and occupancy of an allotment, which, after her death, was ratified to her heirs by virtue of Section 6 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the laws of descent and distribution of the Creek Nation are to be applied as if the deceased Indian had received title to her allotment during her lifetime and died seized thereof."

The Supreme Court of Oklahoma in the case of *Schellenberger* v. *Powell*, in referring to the Creek Supplemental Treaty and to the devolution of an allotment thereunder used the following language:

"It has been held in *Brady* v. *Sizemore*, 33 Okla. 169, 124 Pac. 615, where a duly enrolled citizen of the Creek Nation died before receiving his allotment, and it was later allotted to his heirs, August 23, 1902 (under the 'Creek Supplemental Agreement,' Act of Congress approved June 30, 1902, ratified July 26, 1902), that the devolution of the allotment is governed by Chapter 49 Mansfield's Digest of the laws of Arkansas (Ind. T. Ann. St. 1899, Secs. 1820-1843), to be applied as if deceased had received title to his allotment and died seized thereof. See *Sanders* v. *Sanders*, 28 Okla. 59, 117 Pac. 338; *Hooks* v. *Kennard*, 28 Okla. 457, 114 Pac. 744; *Barnett* v. *Way*, *supra*; and *Brady* v. *Sizemore*, *supra*."

In *Powell* v. *Cotteaden*, 57 Okla., page 1; 156 Pac., page 661, the Supreme Court of Oklahoma held that dower attached in land selected for her husband after death. Following the rule announced in *Cook* v. *Childs*, *supra*.

> "Under the laws of Arkansas, which were in force in the Indian Territory prior to statehood, a surviving widow is entitled to dower in the lands held by her husband for allotment at the time of his death; said lands subsequently being selected in allotment by an administrator."

In *Moffett* v. *Conley*, 63 Okla., page 3, Mr. Justice Sharp of the Supreme Court of Oklahoma reviewed the authorities at length and held that it was not necessary that the lands be selected prior to death in order to vest rights in heirs of a deceased ancestor selected after the ancestor's death. We quote from that opinion, on page 5, the following significant language:

> "We have already seen that Section 28 of the original agreement authorized allotments of the character in question to be made, and that it was there provided that lands to which the enrolled citizen, if living, would be entitled 'shall descend to his heirs' according to the Creek law. Technically, Jennie Hickory and her brother took their title directly from the tribe. The title taken, however, was not in their own right or by reason of their own enrollment, but in the right of their deceased ancestor and by reason of his tribal enrollment."

It is true that under a strict application of common law rules to the conditions obtaining in the Five Civilized Tribes prior to statehood dower and curtesy would not attach for want of actual seisin or possession in the lifetime. But we are constrained to believe that the rule announced by Mr. Justice Hardy in *Cook* v. *Childs*, *supra*, correctly states the law and that a strict interpretation of the common law rules would do violence to the purpose of the framers of the Treaty of September 25, 1902.

If the contention of counsel for plaintiff in error be correct then it necessarily follows that great inequality would result as to the rights of surviving husbands and wives.

Every member of the Choctaw Tribe of Indians was entitled to an allotment and as was said by Judge Hardy in *Cook* v. *Childs*, it was never intended that two citizens duly enrolled as such, each of whom was entitled to a share in the tribal property, where one had selected his allotment and died, his widow would be endowed of his lands, and the widow of another, who has died before making his selection, should be excluded from all dower rights even though he died in point of time later than the one who in fact actually made his selection in his lifetime (*Cook* v. *Childs*, 49 Okla., page 334).

The right of the member to allot tribal property antedates the allotment and by the actual process of allotment the member takes a definite tract of the common domain in which he formerly owned an undivided interest. As was said in *Schultis* v. *McDougal*, *supra*, "It was a birthright. It came to him by the blood of his tribal parents and not by purchase."

Applying the reasoning of the *Schultis* v. *McDougal* case to the facts in this case we are led to the conclusion that there should be no difference in the rights of widows or husbands as to lands of the deceased spouse, and that the technical rule as to actual seisin, which obtained at common law, has no application under the statutes and treaties to which reference has been made in the cases we have called to the court's attention.

We respectfully insist that the contention of counsel for plaintiff in error is not well grounded and that the rule announced by the Supreme Court of the State of Oklahoma as to the question of curtesy should be affirmed.

Plaintiff in Error's Proposition Number Two.

It is contended by counsel for the plaintiff in error that if W. M. Patterson succeeded to an estate by curtesy in the lands selected after death for his wife, his right to assert such estate is barred "by the federal statutes and by the laws of the State of Arkansas extended in force in the Indian Territory." Reference is made under the foregoing proposition to Sections 4471 and 4476 of Mansfield's Digest of the laws of Arkansas, but we do not find any reference to a controlling federal statute fixing a limitation applicable to the facts in this case. While the statement of the contention of counsel for plaintiff in error might warrant the conclusion that some federal statute is relied upon, yet we are constrained to believe that no federal statute has been pointed out and none can be relied upon as fixing a bar to the cause of action in this case. In the outset we respectfully insist that no federal question is presented by the argument advanced under this assignment of error. Even if it should be admitted that the conclusion reached by the Supreme Court of Oklahoma in this case is erroneous, and even though it should be admitted that it is in conflict with a former decision or that it reverses a former decision, in either event the point decided is one which does not involve any federal statute

or deprive the plaintiff in error of any rights under a federal statute.

In the case of *Bauserman* v. *Blunt*, 147 U. S. 648, 37 L. Ed. 316, this court, in speaking of the construction given a statute of the state, used the following language:

> "The construction given to a statute of a state by the highest judicial tribunal of such state is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a state adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications."

In *Roth* v. *Ehman*, 17 Otto. 319, 27 L. Ed. 499, this court held that no federal question was presented and we quote from the opinion the following language:

> "The question of the true construction of a will depends wholly upon general rules of law and upon the local statutes, and in no degree upon the constitution, laws or treaties of the United States. *Giles* v. *Little*, 134 U. S. 645; 33 L. Ed. 1062."

If the court should hold adversely to us with reference to this question and reach the conclusion that the construction placed upon the Arkansas statute in this case is reviewable here, we then respectfully suggest that W. M. Patterson would not be barred by the Arkansas statute fixing seven years as a period of limitation, but the controlling statute would be the fifteen year statute in force after the erection of the state.

Subdivision 4, Section 183, Revised Laws of 1921, reads as follows:

"An action for the recovery of real property, not hereinbefore provided for, within fifteen years."

This statute was in force upon the admission of the state into the Union and in our opinion would be the controlling statute for the reason that while Joines may have gone into possession of the land prior to November 16, 1907, he did not assert title thereto except in pursuance of a guardianship sale. He did not attempt to have this sale consummated and finally confirmed until July 14, 1913. No title was ever taken from Patterson and it was evidently assumed by the parties that Patterson had no title or interest in the land, and he did not pretend to have perfect title as to the minors until a sale was confirmed in 1913. Under these circumstances we respectfully insist that the Oklahoma laws were in force and the controlling statute would be the fifteen year statute insofar as Patterson is concerned. This suit having been instituted on the 21st of February, 1920, by the filing of the petition in the District Court of Murray County, Oklahoma, the cause of action would not be barred by the fifteen year statute hereinbefore mentioned (Transcript of Record, page 7).

While it is true that color of title may not be necessary to the acquisition of title by adverse possession, yet the rule seems to be that a claim of title or right by the occupant is necessary (Cyc. Volume 1, page 1028).

The law has been stated by this court in the case of *Harvey* v. *Tyler*, 69 U. S. 349, 17 L. Ed. 876, in the following language:

> "We think this law to be too well settled to need argument to sustain it. There must be title somewhere to all land in this country. Either in the government, or in some one deriving title from the government, state, or national. Anyone in possession, with no claim to the land whatever, must in presumption of law be in possession in amity with and in subservience to that title. Where there is no claim of right, the possession cannot be adverse to the true title."

In *Brackin* v. *Union Pacific Railway Company* 75 Fed. 347, the Circuit Court of Appeals of the Eighth Circuit held in substance that possession must have been "adverse, open, and notorious," and that "it must have been adverse to all others;" citing several cases in support of the principle announced.

This court, in *Ward* v. *Cochran*, 150 U. S. 602, 37 L. Ed. 1195, in speaking of the essential elements of adverse possession, used the following language on page 608:

> "Tested by these definitions, it is obvious that if the title relied on in this case, by the defendant below, was fully described and characterized by the special verdict, it was defective in two very essential particulars, in that it was not found to have been actual and exclusive. A possession not actual, but constructive; not exclusive, but in participation with the owner or others, falls very far short of that kind of adverse possession which deprives the true owner of his title."

Prior to the date of the confirmation of the pretended guardian's sale on July 14, 1913, Joines was in possession without title from any of the heirs of Emma Patterson, deceased, and by seeking a confirmation of the guardianship proceedings in 1913, he thereby ad-

mitted that he was not claiming title adversely to all parties and under such circumstances the controlling statute would be the fifteen year statute fixed by the laws of the territory of Oklahoma made applicable at the advent of statehood.

In this connection we wish to say in passing that while we are cognizant of the fact that the Supreme Court of the State of Oklahoma, in *Patterson* v. *Rousney*, 58 Okla. 185, 159 Pac. 636, has held that the seven year statute of Arkansas would apply to causes where the statute had begun to run prior to statehood, yet we respectfully suggest that the rule announced in that case is not supported by the better reasoning.

In *Bronson* v. *Kinzie*, 1 Howard, page 311, 11 L. Ed. 142, this court held that the state could regulate the modes of procedure and shorten the time within which claims would be barred. This case has been quoted in support of our argument under plaintiff in error's proposition number three.

Plaintiff in Error's Proposition Number Three.

For the purpose of saving space, we shall not restate proposition number three as set forth on page 87 of the brief of plaintiff in error, but as we understand the point made by counsel it is contended in substance that upon the coming of statehood jurisdiction was conferred upon the County Court of Carter County to confirm the pretended guardianship sales proceedings which had been instituted in the Federal Court of the Southern District at Ardmore prior to statehood.

We respectfully call attention to what appears to us as inaccurate statements with reference to the

agreed statement of facts on which the case was tried. Before proceeding with the discussion of the law questions raised under this proposition, we call attention to the statement in the second paragraph of the brief of plaintiff in error, at page 90, wherein it is said that it was agreed that the plaintiff had been in undisputed possession and claiming ownership since the 5th of October, 1907, and to the statement contained in the second paragraph on page 92 of the brief of plaintiff in error, wherein it is said "All papers pertaining to the sale of the land and on file in the United States Court for the Southern District was transmitted to the County Court of Carter County, and such papers were on file in the County Court of Carter County at the time of the confirmation by the County Court of Carter County."

For further information in connection with these statements we call attention to the agreed statement found in the transcript on pages 66-70 inclusive.

Jurisdiction of United States Court for Southern District of Indian Territory.

Sections 3509 to 3911 inclusive of Mansfield's Digest of the Statutes of Arkansas are quoted and relied upon as the statutory authority for the sale of the lands of these minors prior to statehood, but in this connection we call attention to the fact that the guardian was appointed in the Central District at Durant, Indian Territory, and that his powers and authority as such guardian were based upon the appointment made in the Federal Court of the Central District. No probate proceeding was pending in the Southern Dis-

trict at Ardmore other than the proceeding in which this guardian had sought to sell lands located within the confines of the Southern District, but these proceedings disclose upon their face that he was acting under an appointment and by virtue of authority conferred by the probate court in the Central District of the Indian Territory. Assuming that prior to statehood a valid sale could have been conducted of these lands by the guardian, no sale in fact was completed prior to statehood. The proceeding at Ardmore, Indian Territory, as was held by Mr. Justice Clark, was an ancillary proceeding. Patterson's petition to sell land, filed in the Federal District Court at Ardmore prior to statehood, disclosed that he derived his authority by an appointment in the Central District, and remembering that the proceeding in the United States Court at Ardmore was not a probate proceeding instituted in that court, but was in the nature of an ancillary action to the probate proceedings pending in the probate court of the Central District at Durant, we believe that under the provisions of the Enabling Act this ancillary proceeding was not such a probate matter as would be transferred to the County Court of Carter County, Oklahoma. Under the Oklahoma laws no provision is made for such an ancillary proceeding, and while the action instituted in the Federal Court at Ardmore may not have abated, yet the Probate Court of Bryan County, Oklahoma, was the only court which could have inherited probate jurisdiction as to the Patterson minors.

When the County Court of Bryan County took jurisdiction the same was co-extensive with the state

and excluded the jurisdiction of every other county in the state. *Parmenter* v. *Rowe*, 87 Okla. 161, 200 Pac. 683. No principle of law seems to be more thoroughly established by the decisions of the Supreme Court of Oklahoma than the proposition that only one court can exercise probate jurisdiction over the estates of minors and deceased persons. The county court of the county in which the guardianship proceeding is first instituted has exclusive jurisdiction of the estates of minors and no other court can exercise jurisdiction.

In the second section of the syllabus, in the case of *Crosbie* v. *Brewer*, 68 Okla. 16, 158 Pac. 388, the court said:

> "When a county court once lawfully acquires jurisdiction * * * this jurisdiction cannot be lost except in some prescribed, orderly way."

In *Baird* v. *England*, 85 Okla. 276, 205 Pac. 1098, the law is stated in the first section of the syllabus as follows:

> "The county court of the county in which application is first made for letters testamentary or of administration in any of the cases above mentioned, shall have jurisdiction coextensive with the state in the settlement of the estate of the decedent and the sale and distribution of his real estate, and excludes the jurisdiction of the county court of every other county. Section 6195, Revised Laws of Oklahoma 1910."

Counsel for plaintiff in error take the position that subsequent to statehood, both the County Court of Carter County and the County Court of Bryan County had jurisdiction of the estates of these minors. Brief

of plaintiff in error, pages 102 and 103. As we understand the rule announced in the cases last above mentioned, whatever may have been the law prior to statehood, there could not be two courts subsequent to statehood with jurisdiction of the estates of these minors. Such contention is in conflict with the rule announced in *Parmenter* v. *Rouce*, *Crosbie* v. *Brewer*, and *Baird* v. *England*, *supra*.

No Vested Right in the Matter of Procedure.

It is our position that subsequent to statehood the County Court of Carter County was without jurisdiction to proceed with the sale of the lands of these minors for the reason that the County Court of Bryan County inherited probate jurisdiction from the Federal Court of the Central District of the Indian Territory. We do not contend that this proposed sale could not have been completed and perfected after statehood. We do insist that only one court, subsequent to statehood, had jurisdiction of the persons and estates of these minors and that was the County Court of Bryan County. A sale could have been confirmed in that court for the reason that it had jurisdiction of the minors and there could not be two courts in Oklahoma exercising jurisdiction at one and the same time. *Parmenter* v. *Rouce*, *supra*. This would not deprive the plaintiff in error of any rights as the proper steps could have been taken to perfect the guardianship sale in the proper court and thereby the plaintiff in error might have preserved all of his legal rights in the unfinished sale started prior to statehood.

The Supreme Court of Oklahoma, in the case of *Independent Cotton Oil Company* v. *Beacham*, 31 Okla. 384, 120 Pac. 969, held that there was nothing in the constitution or the schedule to the constitution indicating a purpose to restrict the powers of the state legislature to change the modes of procedure as to actions arising prior to the admission of the state into the union. We quote from Volume 31 Oklahoma Report, page 391, as follows:

> "There is no property in a naked cause of action for tort, but simply a cause of action, based upon a personal injury. *Epstein* v. *Handwerker*, 29 Okla. 337, 116 Pac. 789. It is too nebulous a right, if a right at all, to hold inviolate against the right of a sovereign state to remedy its mode of procedure, as the exigencies of the administration of justice may require."

To the same effect is the rule announced by the Kansas Supreme Court in *Cruce* v. *Douglas*, 3 Kansas, page 121, and we quote from page 125 as follows:

> "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is protected by the constitution."

In the case of *Bronson* v. *Kinzie*, 1 Howard 311 (11 Law Edition 142), the Supreme Court of the United States, in speaking of the power of the state to change the procedure, used the following language:

> "If the laws of the state passed afterwards had done nothing more than change the remedy

> upon contracts of this description, they would be liable to no constitutional objection. For, undoubtedly, a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, for example, shorten the period of time within which claims shall be barred by the statute of limitations."

The Supreme Court of Oklahoma, in the case of *Adams* v. *Item Biscuit Company*, 162 Pac. 938, 63 Okla. 52, held that a citizen had no right of property in a rule of law, and we quote from the sixth section of the syllabus as follows:

> "The citizen has no property in a rule of law, and while rights which have accrued to him under the operation of existing laws and have thereby become vested may not be taken away by a change of the rules, he cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder."

No person has a vested right in any particular mode of procedure or remedy and if before the trial of a case or final judgment the legislature provides a change of procedure, the new methods must be pursued in perfecting rights of property of litigants. *American National Insurance Co.* v. *Donahue*, 54 Okla. 294, 153 Pac. 819; *Independent Oil Company* v. *Beacham*, 31 Okla. 384, 120 Pac. 961.

We do not contend that the proposed sale in question here could not have been confirmed subsequent to statehood, but inasmuch as there was no confirmation prior to statehood for reasons which are not disclosed in the record, we think the court having power to confirm after statehood was the County Court of Bryan

County and not the County Court of Carter County. No rights were denied any of the parties, but the procedure was changed and the sale authorized in the Federal Court at Ardmore prior to statehood remained an incomplete probate proceeding, which, in our opinion, passed to the court in Oklahoma which had jurisdiction of the persons and estates of these minors. To say that the County Court of Carter County inherited jurisdiction along with the County Court of Bryan County is to contend that two courts in Oklahoma could exercise jurisdiction at one and the same time. Such a rule would be in conflict with the principle announced in *Parmenter* v. *Rouse*, *supra*, and with other cases to which we have called attention.

Validity of Sale Without Confirmation.

We respectfully insist that no valid sale could have been had under the laws of Arkansas in force prior to statehood without a confirmation. Just why the sale in this case was not confirmed in the Federal Court prior to statehood is not disclosed by the record and we had no means of ascertaining why the sale was not confirmed. Under the laws of the State of Oklahoma in force upon the admission of the state there could be no guardianship sale without a confirmation. Whether we test the validity of the sale in this respect with reference to the Arkansas law or whether it be tested insofar as the laws of Oklahoma are concerned, in either event the sale was a nullity without a confirmation. If the contention of counsel for plaintiff in error be correct then the right of the proposed

purchaser to have the sale confirmed would be without limitation as to time. In this case the agreed statement of facts discloses the ages of the minors and it is expressly stipulated that the sale was not confirmed until the 14th day of July, 1913.

In the case of *Apel* v. *Kelzie*, 47 Ark. 419, the supreme court of that state stated the law with reference to the necessity of a confirmation as follows:

> "But, so far as appeared, the sale had never been confirmed. Now, a judicial sale passes no title until it is confirmed; and confirmation will not be presumed, but must be shown. The court is the vendor, and what takes place before final approval is in the nature of a bid, which may be accepted or rejected. An administrator's sale to raise a fund to pay debts is a judicial sale, according to all the tests that can be applied."

In the case of *Alexander* v. *Haden*, 54 Ark. 480, the first section of the syllabus is as follows:

> "A guardians' deed, executed in pursuance of an unconfirmed guardian's sale, passes no title."

The same rule has been announced by the Supreme Court of the State of Oklahoma. *Eaves* v. *Mullen*, 25 Okla. 679. In this case, on page 698, the court said:

> "A valid decree of confirmation of the sale was necessary to pass title to the purchaser at the same, from whom it is alleged plaintiff herein derived his title."

A number of cases are cited in support of this statement of the law, but it will be noted that Mr. Justice Hayes was construing the Oklahoma statutes in force in 1908.

In the case of *Hickory* v. *Campbell*, 75 Okla. 79, the court used the following language:

> "The court, in hearing the issue whether or not the value of the land sold is disproportionate to the amount of the bid, should confine the evidence as to its value on day of sale, and not as to its value on the day of confirmation."

Plaintiff in error takes the position in this case that there is no time limit within which the guardianship sale must be confirmed. The Supreme Court of Oklahoma held that the order of sale could not remain in force for more than one year after the granting of the same without a sale being had, and that the sale in this case was void. In this connection we call attention to the age of Dorothy A. Patterson, now McFarland, who had reached majority when the sale was confirmed on July 14, 1913. Our opinion is that no valid sale had been made of her interest in the lands during minority and that she reached majority before the sale was confirmed and therefore the County Court of Carter County was without jurisdiction to proceed further with the sale of lands in which she was interested (see Transcript, page 68). Neither the County Court of Carter County or the County Court of Bryan County had jurisdiction to proceed in any manner after she attained her majority.

Section 1479, Revised Laws of 1921, of the State of Oklahoma, the same being Section 6566 of the Revised Laws of 1910, reads as follows:

> "No order of sale granted in pursuance of this article (chapter) continues in force more than

one year after granting the same, without a sale being had."

While it might be true that under the Arkansas law there was no limitation of time fixed for the confirmation of a guardianship sale, but under the Oklahoma laws an order to sell at private sale remains in force for six months and an order to sell at public sale for one year, and we think that one or the other of these statutes would control and that in any event the court after statehood would be without jurisdiction to confirm a guardianship sale after the expiration of one year from the date of the order. Plaintiff in error cannot contend that he has any vested rights in this respect and we believe that inasmuch as a sale had not been completed upon the advent of statehood, the law governing confirmation after statehood controls, and no confirmation having been made prior to July, 1913, the court acted without authority and in violation of the laws of the State of Oklahoma.

In the case of *Mires* v. *Hogan*, 79 Okla. 233, the court stated the law in the syllabus as follows:

> "In the absence of a constitutional provision to the contrary, there is no vested right in a statute of limitations before the cause of action is barred under it, although the statute began to run before it was extended or shortened by subsequent statute."

Plaintiff in Error's Proposition Number Four.

Under this proposition of law it is contended in substance that the Supreme Court of Oklahoma erred in not holding that the defendants, Dorothy Patterson

and Shelby A. Patterson, were barred by the two year statute of limitations referred to in the brief of plaintiff in error.

In answer to this contention we respectfully suggest that no Federal question is presented for review under this assignment, and that the construction by the Oklahoma Court upon the Oklahoma statute of limitations is controlling upon this court. *Bauserman* v. *Blunt*, 147 U. S. 655. If, however, the court should disagree with us and hold that the question is reviewable here, we then say that the lower court correctly decided the question of law raised under this assignment in the brief of counsel for plaintiff in error. Assuming that W. M. Patterson succeeded to an estate by curtesy upon the death of his wife, he or his grantee would be entitled to possession during the lifetime of Patterson, and Dorothy Patterson and the other children acquired an interest in the lands subject to the life estate of W. M. Patterson. Under such circumstances we think that Dorothy Patterson and the other children would not be barred by any statute of limitations during the tenure of the owner of the life estate.

In *Orthwein* v. *Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159, the court said:

> "Until the death of the life tenant no statute of limitations began to run against the heirs of Susannah Osborn or their grantees; and laches can only be imputed to them from the time their right of entry accrued."

The same rule was announced in *Jackson* v. *Johnson* by the Supreme Court of New York in the case

reported in 14 American Decision, page 433, wherein we have the following language:

> "A right of entry in favor of a person must exist before the statute of limitations can run against him."

With reference to the application of the statute to Dorothy McFarland, nee Patterson, we call attention to the fact that she reached majority before the sale in fact was confirmed. In other words she was an adult person on the 14th of July, 1913, and the probate court was without authority to proceed in any manner with reference to a sale of her interest in the land, and inasmuch as no title was passed in the guardianship proceedings as to her, the applicable statute of limitations, if any applies at all, would be the fifteen year statute to which we have called attention and not the two year statute cited by counsel for plaintiff in error as to the statute which applies in guardianship sales.

Plaintiff in Error's Proposition Number Five.

We do not deem it necessary to make an extensive reply to the argument advanced under this contention of counsel for plaintiff in error. While it is true, as stated by counsel for plaintiff in error, that the construction placed upon a statute by the highest court of the state from which the statute is taken is controlling as a general rule, yet we do not understand that counsel point out any cases or statutes which raise a federal question, and we respectfully submit that no argument is advanced under this assignment of error which needs serious consideration. Whether the court

in fact reversed a former holding or not, or whether or not the decision reached by the court in this case was correct, is solely and exclusively a state question and in no sense a federal question.

We also wish to call attention to the fact that the questions of law raised in this proposition were not passed upon by the Supreme Court of Oklahoma in any stage of this case, and we do not understand that this court will review questions which were not passed upon by the lower court, but even if it should be assumed that the court refused to follow a construction placed by the Arkansas Supreme Court upon an Arkansas Statute, that would be nothing more nor less than the construction by the Oklahoma Supreme Court of a local statute and would in no sense present a federal question reviewable in this court.

Plaintiff in Error's Proposition Number Six.

In the brief of counsel for plaintiff in error reference is made on page 134 to the validity of a sale where adult and minor heirs did not join under the provisions of section 22 of the Act of Congress of April 26, 1906, 34 Stat. 137, and while mention is made of one or two authorities, we are inclined to believe that counsel for plaintiff in error does not seriously press this proposition of law. No reference is made in the opinion of the Oklahoma Supreme Court to the necessity of a joint sale and the proposition advanced by counsel under this assignment is aside from the issues in the case.

The supreme court held that the attempted sale of the interest of the minors in the lands in controversy was void, but reached that conclusion wholly without

regard to the Act of Congress of April 26, 1906, to which reference is made in the brief of counsel for plaintiff in error. No reference is made by the Supreme Court of Oklahoma to the Act of April 26, 1906, insofar as the same affects the validity of this sale, and we assume that counsel for plaintiff in error cannot seriously insist that this question is reviewable in the Supreme Court of the United States.

CONCLUSION.

In conclusion we respectfully insist:

First: That the respective contentions advanced by counsel for the plaintiff in error present no federal question reviewable in this court.

Second: That the judgment of the Supreme Court of Oklahoma is correct and the case should be affirmed by this court.

Respectfully submitted,

W. F. Semple,
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